

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WOODFIN SUITE HOTELS, LLC and
PACIFIC HOTEL MANAGEMENT, LLC,

No. C 06-1254 SBA

ORDER

Plaintiffs,

v.

CITY OF EMERYVILLE,

Defendant.

This matter comes before the Court on Plaintiffs Woodfin Suite Hotels, LLC and Pacific Hotel Management, LLC's (jointly, "Plaintiffs") Motion for Preliminary Injunction [Docket Nos. 4, 23], Defendant City of Emeryville's ("Defendant" or the "City") Objections to Evidence and Supplemental Evidence [Docket Nos. 41, 57], and Defendant's Request for Judicial Notice [Docket No. 40]. Having read and considered the arguments presented by the parties and the amici curiae in their moving papers, as well as the parties' supplemental briefing papers, the Court finds this matter appropriate for disposition without a hearing. The Court HEREBY DENIES Plaintiffs' Motion for Preliminary Injunction, SUSTAINS IN PART and OVERRULES IN PART Defendant's Objections to Evidence and Supplemental Evidence, and GRANTS IN PART and DENIES IN PART Defendant's Request for Judicial Notice.

BACKGROUND

I. Measure C

On November 8, 2005, residents of the City of Emeryville passed Measure C ("Measure C" or "Ordinance"). On December 6, 2005, Measure C went into effect. Measure C applies to the hotels in the City which have more than 50 rooms (the "Hotels"). Measure C provides for, *inter alia*:

- Minimum compensation of \$9 per hour and average minimum compensation of \$11 per hour for all employees.

- Annual cost of living increases, calculated by the Consumer Price Index.
- Paid leave at the employees' regular rate of pay for jury duty.
- Protection against discharge for 90 days following a change in ownership of the Hotels or another employer within the Hotels, absent good cause.
- Payment of time-and-a-half for the room cleaners who clean more than 5,000 square feet in an 8 hour work day.
- Maintenance by Hotels of employee compensation records, including names, pay rates, and benefit payments (if the Hotels want to credit benefit payments toward total compensation).
- "Reasonable access" to Hotels by city representatives and organizations assisting employees in the hospitality industry for the purpose of monitoring compliance with Measure C and investigating complaints of non-compliance.

See Defendant City of Emeryville's Request for Judicial Notice in Support of Opposition to Motion for Preliminary Judgment [sic], Ex. A (the "Ordinance").¹

Measure C includes the following findings: "[I]t is proper to regulate employment conditions at large hotels first rather than trying to regulate all employers because [the People] believe that (1) large hotels are better able to afford the proposed conditions than other kinds of employers; (2) many large hotels in the Bay Area are already meeting the employment conditions required by this Ordinance, unlike the situation in other industries; (3) large hotels provide jobs similar to the janitorial jobs already protected by a similar state law on worker retention, Labor Code sections 1060-65; and (4) large hotels are generally less likely to respond to such regulations by closing or reducing employment than other kinds of businesses which can more readily move jobs offshore or to other locations, as large hotels wish to be here because of our city's location." Ordinance, § V.

¹ Defendant requests that the Court take judicial notice of Measure C pursuant to Federal Rule of Evidence 201(b). Under Rule 201, a court may take judicial notice of "matters of public record" as long as the facts are not "subject to reasonable dispute." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (citations omitted). The ordinance falls within the ambit of Federal Rule of Evidence 201(b)(2), because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See, e.g., *Manufactured Home Communities, Inc. v. City of San Jose*, 358 F. Supp. 2d 896, 904 (N.D. Cal. 2003) (taking judicial notice of municipal ordinances), *rev'd on other grounds*, 420 F.3d 1022 (9th Cir. 2005). Consequently, the Court GRANTS Defendant's request with respect to Measure C.

Defendant also seeks to have the Court take judicial notice of the Notice of Intent to Circulate Petition. Because the Court does not rely on the Notice of Intent in its ruling, the Court DENIES Defendant's request as moot.

II. Procedural Background

On February 21, 2006, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief (the "Complaint") against Defendant. The Complaint seeks declaratory and injunctive relief arising from the passage of Measure C, and argues that Measure C is unconstitutional and preempted by state and federal law. Complaint, ¶ 8. Plaintiffs allege that Measure C was passed to primarily tilt the economic playing field in favor of organized labor. *Id.*, ¶ 14.

The same day, Plaintiffs filed the instant Motion for Preliminary Injunction.² In the motion, Plaintiffs assert that they have demonstrated a likelihood of success on the merits, and they will face an imminent and irreparable harm in the absence of a preliminary injunction. Plaintiffs argue that there is a likelihood of success on the merits because Measure C is preempted by the National Labor Relations Act, including *Machinists* and *Garmon* doctrines, the Employment Retirement Income Security Act of 1974, and California labor law, including wage-and-hour law and at-will employment law. In addition, Plaintiffs argue that they have demonstrated a likelihood of success on the merits because Measure C conflicts with constitutional privacy rights, is unconstitutionally vague and violates Due Process and Equal Protection Clauses.

On March 7, 2006, Don Crosatto, Daniel Leal, Josephine Valdez, and EBASE Committee – Yes on Measure C (the "Amici") filed a motion to intervene. The Court heard the motion on April 11, 2006. During the hearing, the Amici withdrew their motion to intervene without prejudice, and the Court allowed them to file an opposition to the motion for preliminary injunction as amici curae. In their Opposition to Plaintiffs' Motion for Preliminary Injunction (the "Amici Opposition"), Amici claim that Plaintiffs are unlikely to prevail on the merits and the balance of irreparable injuries weighs against granting a preliminary injunction.

Defendant also filed its Opposition to Plaintiffs' Motion for Preliminary Injunction (the "Opposition"). Defendant argues that Plaintiffs do not have standing to challenge Measure C, have

² After Defendant declined to proceed before a U.S. Magistrate Judge, the action was reassigned to this Court on March 3, 2006. Plaintiffs filed an amended motion before this Court on March 9, 2006.

1 not demonstrated a likelihood of success on the merits, have not demonstrated any risk of irreparable
2 injury, and the public interest will be harmed by the issuance of injunctive relief.

3 On April 19, 2006, the Court requested supplemental briefing from the parties on the issue of
4 standing. On April 26, 2006, Plaintiffs filed a Supplemental Brief re Standing. Plaintiffs assert they
5 have standing to challenge each provision of Measure C based on their own stake in the lawsuit,
6 which includes the administrative burden of complying with Measure C, the invasion of their
7 employees' privacy rights, and the direct monetary costs and interference with their operations. In
8 addition, Plaintiffs argue that it is unnecessary to establish independent standing grounds for every
9 potential argument and sub-issue.

10 On May 3, 2006, Defendant filed its Supplemental Brief in Opposition to Motion for
11 Preliminary Injunction. In the Supplemental Brief, Defendant argues that Plaintiffs have the burden
12 of demonstrating standing, they must establish such standing for each challenged provision,
13 administrative monitoring and reporting obligations do not constitute injury, and Plaintiffs have
14 failed to demonstrate that Measure C requires them to change their business operations or otherwise
15 injures them.

16 LEGAL STANDARD

17 Federal Rule of Civil Procedure 65 permits the issuance of a preliminary injunction to
18 preserve the positions of the parties until a full trial can be conducted. *LGS Architects, Inc. v.*
19 *Concordia Homes*, 434 F.3d 1150, 1158 (9th Cir. 2006) (citing *University of Texas v. Camenisch*,
20 451 U.S. 390, 395 (1981)). When a party is seeking a preliminary injunction, he or she must show
21 either: "(1) a combination of probable success on the merits and the possibility of irreparable injury,
22 or (2) that serious questions are raised and the balance of hardships tips sharply in [her or his
23 favor]." *Stuhlberg Int'l Sales Co. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839- 40 (9th Cir.
24 2001). "These two formulations represent two points on a sliding scale in which the required degree
25 of irreparable harm increases as the probability of success decreases." *Roe v. Anderson*, 134 F.3d
26 1400, 1402 (9th Cir. 1998).

27 Under the sliding scale theory, a party seeking an injunction "need not demonstrate that he
28 will succeed on the merits, but must at least show that his cause presents serious questions of law

worthy of litigation." *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993). "Serious questions" are those which are "substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." *Senate of State of Cal. v. Mosbacher*, 968 F. 2d 974, 977-78 (9th Cir. 1992) (citing *Gilder v. PGA Tour, Inc.*, 936 F. 2d 417, 422 (9th Cir. 1991)); *Republic of the Philippines v. Marcos*, 862 F. 2d 1355, 1362 (9th Cir. 1988) ("serious questions" refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo."). Although the serious questions posed by the movant "need not promise a certainty of success, nor even a probability of success," he or she must nevertheless demonstrate a "fair chance of success" on the merits. *Gilder*, 936 F.2d at 422; *see also Senate of State of Cal.*, 968 F.2d at 977. Finally, under either of these tests, in cases where the public interest may be affected, the court must consider the public interest as a factor in balancing the hardships. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004) (citing *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992)).

"The grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged except in a case clearly warranting it." *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970). *See also Clairol Inc. v. Gillette Co.*, 389 F.2d 264, 265 (2d Cir. 1968) ("The award of a preliminary injunction is an extraordinary remedy, and will not be granted except upon a *clear showing* of probable success and possible irreparable injury.") (emphasis added).

ANALYSIS

I. Standing

To meet Article III standing requirements, Plaintiffs must establish that (1) they suffered an actual and imminent injury, which is concrete and particularized, not hypothetical or conjectural; (2) there is a causal connection between the injury and the conduct of which Plaintiffs complain; and (3) it is likely, rather than speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The burden of proof for standing rests on the Plaintiffs. *Id.* Thus, if Plaintiffs fail to allege facts essential to show jurisdiction, they have no standing. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), *overruled in part on other*

1 grounds by *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004). When only injunctive and
 2 declaratory relief is sought, Plaintiffs must show a significant possibility of future harm in order to
 3 have standing to bring suit. *See Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir.1990).
 4 Pre-enforcement review of an ordinance is usually granted when the ordinance imposes costly,
 5 self-executing compliance burdens. *National Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 279
 6 (6th Cir. 1997).

7 As a preliminary matter, Plaintiffs are required to establish standing as to each provision of
 8 Measure C, since they are challenging all provisions.³ *See FW/PBS*, 493 U.S. at 231 (finding that
 9 plaintiffs lacked standing to challenge two provisions of the ordinance, but had standing to challenge
 10 other provisions); *Clark v. Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001) ("A plaintiff may have
 11 standing to challenge some provisions of a law, but not others.").

12 Plaintiffs assert three bases for standing. First, Plaintiffs argue that they have standing to
 13 challenge the ordinance because as hotels that have more than 50 rooms, they are a target of the
 14 ordinance. Plaintiffs rely on *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th
 15 Cir. 2004), in which the Tenth Circuit found standing to challenge a state law restricting storage
 16 activities. However, while the Court finds *Skull Valley* instructive, it is distinguishable because the
 17 statutes challenged in *Skull Valley* imposed a "substantial burden" on plaintiffs, such as payment of a
 18 five-million-dollar nonrefundable application fee, compliance with complex state regulatory
 19 requirements, the posting of a two-billion-dollar bond, and infringement upon the Indian tribe's
 20 inherent tribal sovereignty. Here, on the other hand, Plaintiffs allege "huge administrative burdens"
 21 to ensure compliance of subcontractors with minimum wage requirements, "time and money to
 22 measure the floor space being cleaned by each room cleaner on an hour-by-hour basis," and
 23 "implement[ing] specific policies to avoid . . . output-based wage rates." Lacy Decl., ¶¶ 12, 18, 19.
 24 While Plaintiffs allege "huge administrative burdens," they do not provide any basis for this Court to
 25 conclude that Measure C requirements will result in huge burdens. In fact, Plaintiffs' allegations

26
 27 ³ Plaintiffs argue that they are not required to establish independent standing grounds for
 28 every potential argument and sub-issue. To the extent Plaintiffs are arguing that they are not
 required to establish independent standing grounds for each challenged provision of Measure C, they
 are incorrect.

lead the Court to conclude that the burdens imposed on Plaintiffs – measuring floor space, obtaining data on wages from subcontractors, and changing certain policies – do not rise to the level of the "substantial burden" present in *Skull Valley*. In addition, not every provision of Measure C imposes such administrative burdens on Plaintiffs. Accordingly, the fact that Plaintiffs are a “target” of the Ordinance and that the Ordinance on its face applies to them is insufficient to confer standing on Plaintiffs to challenge the Ordinance in its entirety. *See Clark*, 259 F.3d at 1006-07 (owner of an adult cabaret had standing to challenge some, but not all, provisions of the City of Lakewood's adult cabaret ordinance, even though the ordinance on its face applied to the owner's business).

The Court will next address whether Plaintiffs carried their burden to show standing with respect to each provision of Measure C.⁴

A. *Minimum Wage Provision*

Measure C provides that the Hotels must pay each employee at least \$9 per hour, and the average compensation of all employees during a calendar year shall be at least \$11 per hour. Ordinance, § I.A. The compensation is defined as wages (or salary) and health benefits. If employer contributions for health benefits are not paid on an hourly basis but the employer nonetheless wishes a credit for such payments, it must present data to the City concerning hours worked and health contributions made, and the City Manager or his designee shall estimate the value of such benefits on an hourly basis. *Id.* The rates shall be upwardly adjusted annually based on a regional Consumer Price Index. *Id.*

Plaintiffs do not argue that they pay their employees less than \$9.00 per hour. However, they claim that Measure C’s broad definition of “employee” imposes substantial administrative and

⁴ Although Plaintiffs assert substantial administrative burdens for all of the provisions of Measure C, they have not provided factual support with respect to all of the provisions. Counsel's conclusory statement to the contrary is insufficient to meet Plaintiffs' burden of showing standing as to each provision. *See FW/PBS*, 493 U.S. at 235 (“the necessary factual predicate [for standing purposes] may not be gleaned from the briefs”). Rather, Plaintiffs have shown that an administrative burden is imposed on them only by certain provisions of the Ordinance, as discussed herein.

monetary burdens on them.⁵ Specifically, Plaintiffs provide evidence that there are many contractors with whom Plaintiffs will have to negotiate compliance issues, including elevator service, computer technology service, thirteen food and wine purveyors, a roofing contractor, a landscaping contractor, land association services, fire and safety equipment service contracts, and others. Supplemental Declaration of De Davies in Support of Plaintiffs' Supplemental Brief re Standing ("Davies Decl."), ¶ 9; Supplemental Declaration of Randy H. Lacy in Support of Plaintiffs' Supplemental Brief re Standing ("Lacy Decl."), ¶ 7. Some of the contractors have informed Plaintiffs that they will not provide payroll data to Plaintiffs, and Plaintiffs have no way to force them to do so. Davies Decl., ¶ 10; Lacy Decl., ¶ 8.⁶ In order for Plaintiffs to comply with the minimum wage provision, Plaintiffs will have to ensure that the contractors' employees who fall under the Ordinance's definition of "employee" receive \$9 per hour minimum wage and \$11 per hour average wage. The time and cost incurred in coordinating compliance efforts with the contractors impose a concrete and particular burden on Plaintiffs, that absent the Ordinance they would not have to assume. *See Retail Industry*

⁵ Measure C provides: "'Employee' includes not only common-law employees of the operator, but also persons regularly engaged on the premises in providing services to hotel guests as a contractor, subcontractor, tenant, subtenant, licensee or sublicensee, or as an employee thereof. Workers who are not common-law employees of the operator shall not be deemed 'regularly engaged' on the premises unless they spend more than five hours per week there for more than four weeks. The permittee shall remain ultimately liable for compliance with this Ordinance regardless of whether or not it is the common-law employer of the Employees. 'Employee' does not include any managerial or administrative employees receiving more than \$50,000 per year in wages, salary, bonus, commission or other compensation from the Hotel." *Id.*, § III.2.

⁶ In addition, Plaintiffs provide evidence regarding the wages paid by some of these contractors and the burden of calculating the minimum and average wage for the contractors and coordinating compliance. Davies Decl., ¶¶ 16, 17. Defendant objects to this evidence as speculative, conclusory, assuming facts not in evidence, and lacking in personal knowledge and foundation. The Court finds this evidence speculative. For example, De Davies, the General Manager for Plaintiff Woodfin Suite Hotels, LLC, declares that "Woodfin currently has no legal or contractual right to access the private payroll records of its contractors." Davies Decl., ¶ 14. At the same time, Davies declares that he is "certain that at least some of the contractors must have employees who are paid at an hourly rate of less than \$9.00 and an average rate of less than \$11.00. If Woodfin were able to ascertain these figures for compliance issues, it could be financially liable in some way for any payment shortfall by its contractors." Davies Decl., ¶ 17. If Plaintiffs are unable to ascertain the contractors' pay rate for the employees, as they allege, Plaintiffs cannot also claim that they are certain that the contractors pay less than Measure C now requires. The Court therefore SUSTAINS Defendant's objection to this evidence. Even if the Court were to consider this evidence, the Court would not rely on it because the Court finds that the time and cost Plaintiffs will incur in coordinating compliance efforts with the subcontractors constitute a sufficient injury-in-fact to confer standing on Plaintiffs to challenge this provision. *See Retail Industry*, – F. Supp. 2d –, 2006 WL 2007654, *3.

Leaders Ass'n v. Fielder, – F. Supp. 2d –, 2006 WL 2007654, *3 (D. Md. July 19, 2006) (the challenged statute required certain employers to report on an annual basis information such as the number of employees, the amounts spent in the preceding year on health insurance, and the percentage of payroll that amount constituted; the court found that the time and cost incurred in meeting this requirement, while somewhat trivial, was nevertheless a concrete and particular injury-in-fact sufficient for standing purposes). Because the Court finds the reasoning of *Retail Industry* persuasive, it finds that Plaintiffs have standing to challenge the minimum wage provision of the Ordinance.

B. Provision Regarding Protection of Employees from Unjust Discharges When a New Employer Takes Over

Section I.B. of the Ordinance provides that if there is a sale of the hotel or other change resulting in a new person or entity taking over as an employer at the hotel, the new employer must retain all employees for at least 90 calendar days unless there is reasonable and substantiated cause to discharge such employee based on that employee's performance or conduct. In the event of a layoff during the first 90 days of the new employer's operation, the laid off employee shall be entitled to reinstatement should any position become available within the following 24 months which the employee can perform. Plaintiffs argue that this provision requires them to "immediately alter" their at-will employment policy by restricting their ability to terminate employees during a 90-day period following a sale or a change in an employer at the hotel. Davies Decl., ¶ 26; Lacy Decl., ¶ 24. According to Plaintiffs, hotels frequently "contract with specialized management companies to run all or part of a hotel's operations" and, under Measure C, Plaintiffs cannot hire any such management company without suspending their at-will employment policy. Davies Decl., ¶ 27; Lacy Decl., ¶ 25.⁷

⁷ Defendant objects to this evidence on the grounds that it is speculative, irrelevant, conclusory, assumes facts not in evidence, and calls for legal conclusion. Plaintiffs have not provided any evidence suggesting that they have attempted to hire a management company or plan to do so in the near future. Furthermore, Plaintiffs do not show that a new management company will constitute a new employer for purposes of the 90-day provision and thus would trigger it. Accordingly, the Court finds that this evidence is speculative and irrelevant and therefore SUSTAINS Defendant's objections. *See, e.g., Wal-Mart Stores, Inc. v. County of Clark*, 125

The Court is not persuaded by Plaintiffs' arguments given the absence of any assertion by Plaintiffs that there are any plans or likelihood of a sale of the hotel or a change in employers. In *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1281 (10th Cir. 2002), the Tenth Circuit found that plaintiffs, a nude dancing establishment and two women denied employment as dancers, lacked standing to challenge a portion of an ordinance which allowed the city to deny a business or employee license based on previous criminal convictions. The court noted that there was no allegation that the dancing establishment is owned or controlled by any individuals subject to the challenged portion. Nor was there an allegation that the individual plaintiffs have been convicted of crimes. The court explained that "[m]erely because [the dancing establishment] is prospectively inhibited from such ownership and employment arrangements is in this case a hypothetical injury." *Id.* In addition, the court found that plaintiffs lacked standing to challenge the section of the ordinance allowing the denial of an application for a business license for an adult entertainment establishment. The dancing establishment already had a license. While the ordinance required a new application in the event of a change in ownership, the dancing establishment had not alleged that it would change ownership or was likely to do so. Thus, the court found that it was "pure conjecture" to conclude that the dancing establishment would again have to apply for a new license. *Id.*

Similarly, Plaintiffs have not alleged that there are any plans to sell the hotel or change any employer. Instead, they only assert conclusory allegations regarding what is common in the hotel industry. Accordingly, the Court finds that Plaintiffs have not demonstrated that they have standing to challenge this provision of the Ordinance because the injury they allege is hypothetical.

C. Workload Standards for Room Cleaners Provision

Section I.C. of the Ordinance provides that employees working as room cleaners shall be paid at least time-and-a-half the minimum average compensation of \$11 per hour for all time worked in a day if required to clean rooms amounting to more than 5,000 square feet of floorspace in an

F.Supp.2d 420, 430 (D. Nev. 1999) (the court found an affidavit provided by Wal-Mart's director of real estate that Wal Mart had plans for two additional "Supercenters" in the next 18-24 months "speculative in nature," because no evidence was provided that land for these additional sites had been purchased or pieces of property had been identified for development).

1 eight-hour workday. Plaintiffs argue that tracking of employee compliance with the square footage
 2 based compensation scheme would require them to spend time and money to measure the floor space
 3 being cleaned by each room cleaner on an hour-by-hour basis, and to implement specific policies to
 4 avoid paying time-and-a-half to room cleaners, which would restrict productivity. Davies Decl., ¶
 5 20; Lacy Decl., ¶ 18.⁸ The administrative burden of measuring floor space, even if trivial, is
 6 nevertheless a concrete and particular burden which Plaintiffs would not otherwise be required to
 7 assume absent this Ordinance. *See Retail Industry*, – F.Supp. –, 2006 WL 2007654 at *3.
 8 Accordingly, the Court finds that Plaintiffs have standing to challenge this provision.

9 ***D. Paid Leave for Jury Duty Provision***

10 Section I.D. requires each large hotel to ensure that employees are provided with paid leave
 11 for jury duty. Plaintiffs neither make an argument nor provide any evidence how this provision
 12 injures them. They do not assert that they currently do not provide paid leave for jury duty.
 13 Plaintiffs simply argue, conclusorily, that “substantial administrative burdens are imposed on
 14 Plaintiffs as a result of every one of Measure C’s regulatory requirements.” Plaintiffs bear the
 15 burden of proof with respect to standing to challenge each provision. They have not carried their
 16 burden with respect to this provision. *See FW/PBS*, 493 U.S. at 235 (“the necessary factual
 17 predicate [for standing purposes] may not be gleaned from the briefs”). The Court is not inclined to
 18 fill the void with assumptions. Thus, the Court finds that Plaintiffs have not demonstrated that they
 19 have standing to challenge this provision.

20 ***E. Compliance with Enforcement Provision***

21 Section I.E. provides that hotel compliance with enforcement provisions, set forth in section
 22 IV of the Ordinance, shall also be a condition for a permit. Since the Court finds that Plaintiffs have
 23 standing to challenge one of the enforcement provisions, *see infra* at 14, and Section I.E. necessarily
 24

25 ⁸ Defendant objects to this evidence on the grounds that it is speculative, conclusory,
 26 irrelevant, and lacks foundation, and argues that Plaintiffs have not asserted that any employee at
 27 this time cleans more than 5,000 square feet of floor space in a workday. Plaintiffs did not have to
 28 calculate the floorspace cleaned by each room cleaner until the Ordinance was passed. *See*
 Plaintiffs' Supplemental Brief re Standing at 5; Lacy Decl., ¶ 18. Plaintiffs cannot be required to
 bear this expense to support a motion in which they argue that they should not have to expend this
 time and money. Thus, the Court OVERRULES Defendant’s objections to this evidence.

1 relies on all enforcement provisions, the Court finds that Plaintiffs have standing to challenge this
2 provision.

3 ***F. City Costs to Be Covered by Permit Fees Provision***

4 Section II of the Ordinance provides that each hotel subject to the Ordinance shall pay a
5 permit fee annually to the City representing its share of city costs in enforcing the Ordinance. The
6 permit fee is a concrete and particular burden which Plaintiffs would not otherwise be required to
7 assume absent this Ordinance. *See Retail Industry*, – F.Supp. –, 2006 WL 2007654 at *3.
8 Accordingly, the Court finds that Plaintiffs have standing to challenge this provision.

9 ***G. Enforcement Provisions***

10 Section IV contains the enforcement provisions which enable the City, City residents,
11 organizations operating within the City and employees of large hotels to enforce the Ordinance.
12 Specifically, such persons or entities can bring an action in the Superior or Municipal Court for
13 injunctive relief and to collect damages for all persons injured by the violation of the Ordinance and
14 to collect penalties for the City. The enforcement provisions further require each large hotel to
15 maintain a record of each employee's name, pay rate, and if the hotel claims credit for health
16 benefits, the sums paid by the hotel for the employee's health benefits. The hotel is required to
17 submit to the City a copy of such records annually. Finally, the enforcement provisions require each
18 large hotel to permit reasonable access to its workforce inside the hotel to authorized City
19 representatives or any organization assisting employees in the hospitality industry. The access may
20 be used solely for the purpose of monitoring compliance with the Ordinance, and it includes the
21 right of City representatives to inspect and copy payroll records, which information may only be
22 used for purpose of enforcing the Ordinance.

23 Plaintiffs claim that this provision injures them because: (1) disclosure of employee records
24 to City officials would make them publicly accessible to any request under the California Public
25 Records Act; (2) employees will quit if salary and social security numbers are released; and (3)
26 access to the workforce would damage Plaintiffs' ability to maintain good order and discipline.
27 Davies Decl., ¶ 32 ("Many of [the hotel's] employees have reported that they will quit their jobs with
28 no advance notice if [the hotel] turns over their salary and social security information to outside

parties."); Lacy Decl., ¶¶ 28, 29 ("Allowing outside groups to enter [the hotel's] premises and solicit its workforce during their work hours will be very harmful to its ability to maintain good order and discipline within its workforce. [New paragraph] Measure C also requires the disclosure of [the hotel's] employee 'payroll' records to City officials, whereupon they could become publicly accessible to any request under the California Public Records Act ('CPRA'). [The hotel's] payroll records include private information As the custodian of these private records, [the hotel] has a duty to prevent any public disclosure of this information.").⁹

Under the doctrine of "third-party" or "*jus tertii*" standing, plaintiffs may assert the rights of others not before the court if they show that: (1) they have a close relationship with the person who possesses the right, and (2) there is a hindrance to the possessor's ability to protect his or her own interests. *Aid for Women v. Foulston*, 441 F.3d 1101, 1111-12 (10th Cir. 2006). Plaintiffs have made no such showing. Even if the Court were to find that Plaintiffs have the requisite close relationship with their employees, Plaintiffs have not shown that there is a hindrance to the employees' ability to protect their own interests. Requiring employees to assert their own rights is essential to ensure effective advocacy. *See, e.g., Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 489 (9th Cir. 1996) (finding that employer did not have standing to assert its employees' NLRA preemption claim); *U.S. v. Amalgamated Life Ins. Co.*, 534 F. Supp. 676, 679 n. 5 (S.D.N.Y. 1982) ("[T]here is . . . a danger in recognizing standing for a party asserting the privacy rights of others when the interests of the party asserting the privacy rights and the parties possessing the privacy rights differ. The third party, whether an employer or insurance company, may present a more vigorous defense on privacy grounds than would the employees after properly considering all of their interests."). Thus, Plaintiffs have not demonstrated that they have standing to challenge Measure C's enforcement provisions on behalf of their employees.

Furthermore, Plaintiffs have not demonstrated that the enforcement provision requiring hotels to allow city representatives to inspect and copy employees' payroll records injures them.

⁹ Defendant objects to this evidence on the grounds that it is speculative, conclusory, lacks foundations, lacks personal knowledge, and assumes facts not in evidence. The Court **OVERRULES** Defendant's objections as moot because the Court finds that Plaintiffs have not demonstrated that they have standing to assert rights of third-parties, namely, their employees.

1 They have produced four declarations from employees speculating that they may be inclined to quit
 2 if third parties such as City representatives or City residents have access to their payroll records and
 3 social security numbers without their authorization. *See* Declaration of Christopher Maikish (a sales
 4 manager); Declaration of Nonito Matocinos (a food and beverage manager); Declaration of Monica
 5 Roca (administrative bookkeeper); Declaration of Noel Franco (banquet server). Defendant objects
 6 to these declarations on the grounds that they lack foundation because Measure C does not require
 7 disclosure of personnel and payroll information to any City resident; they are irrelevant and
 8 speculative; and they assume facts not in evidence. First, it is not clear that Measure C actually
 9 applies to any of these declarants.¹⁰ If Measure C does not apply to these employees, the evidence
 10 that they may be inclined to quit is irrelevant. Furthermore, California Government Code Section
 11 6254(n) exempts from disclosure "personal financial data required by a licensing agency and filed by
 12 an applicant with the licensing agency to establish his or her personal qualifications for the license,
 13 certificate or permit applied for." Cal. Gov. Code § 6254(n). Section 6254(c) exempts from
 14 disclosure "personnel, medical, or similar files, the disclosure of which would constitute an
 15 unwarranted invasion of personal privacy." Cal. Gov. Code § 6254(c). Consequently, the disclosure
 16 of employee information for licensing and regulatory purposes would not result in a public
 17 disclosure because it is insulated from disclosure pursuant to the California Public Records Act. In
 18 addition, state agencies already have the right to review payroll records in connection with state
 19 minimum wage laws. Cal. Lab. Code § 1174(b). Thus, Plaintiffs will not suffer any additional
 20 burdens as a result of Measure C.

21 Similarly, Plaintiffs have not provided any evidence that allowing outside groups to enter
 22 Plaintiffs' premises and solicit its workforce during their work hours will disrupt good order and
 23 discipline, except to provide the Court with a conclusory prediction to that effect, which is
 24 insufficient to confer standing on Plaintiffs. *See United Transp. Union v. I.C.C.*, 891 F.2d 908, 912
 25 (D.C.C. 1989) ("When considering any chain of allegations for standing purposes, we may reject as

27 ¹⁰ Measure C defines employees as those who receive compensation under \$50,000 per
 28 year. None of the declarants states that he or she receives compensation under \$50,000 or that
 Measure C applies to him or her.

1 overly speculative those links which are predictions of future events . . .); *Allen v. Wright*, 468 U.S.
 2 737, 751 (1984) ("The injury alleged must be . . . 'distinct and palpable' . . . and not 'abstract' or
 3 'conjectural' or 'hypothetical' . . . "). Since access is only allowed to ensure compliance or
 4 investigate a complaint of non-compliance with Measure C, there is no basis to conclude that such
 5 access would result in inappropriate solicitation of Plaintiffs' employees by unions and, as a
 6 consequence, a disruption of "good order and discipline."

7 The only enforcement provision for which Plaintiffs have made a sufficient showing of
 8 standing relates to maintenance of employee records and the annual provision of a copy of these
 9 records to the City. *See* Ordinance, § IV.E. For the reasons discussed with respect to provisions
 10 under sections I.A. and I.C. of the Ordinance, the Court finds that the time and expense mandated by
 11 such an annual reporting requirement is sufficient to constitute injury-in-fact. *See supra* at 7-8, 10-
 12 11. *See also Retail Industry*, – F. Supp. 2d –, 2006 WL 2007654, *3.

13 For the foregoing reasons, the Court finds that Plaintiffs have not demonstrated that they
 14 have standing to challenge any provisions of the Ordinance, except for the minimum wage
 15 provision, set forth in section I.A.; the workload standards for room cleaners provision, set forth in
 16 section I.C.; the compliance with enforcement provision, set forth in section I.E.; the permit fees
 17 provision, set forth in section II; and the annual reporting requirement, set forth in section IV.E.

18 **II. Preliminary Injunction**

19 **A. Irreparable Injury**

20 When a party is seeking a preliminary injunction, they must show either: "(1) a combination
 21 of probable success on the merits and the possibility of irreparable injury, or (2) that serious
 22 questions are raised and the balance of hardships tips sharply in [his or her favor]." *Stuhlbarg Int'l*
 23 *Sales Co.*, 240 F.3d at 839- 40. "These two formulations represent two points on a sliding scale in
 24 which the required degree of irreparable harm increases as the probability of success decreases."
 25 *Roe*, 134 F.3d at 1402. "Under any formulation of the test, plaintiff must demonstrate that there
 26 exists a significant threat of irreparable injury." *Oakland Tribune, Inc. v. Chronicle Publishing Co.*,
 27 762 F.2d 1374, 1376 (9th Cir. 1985). If the Court determines that Plaintiffs have not made a
 28 showing of "a significant threat of irreparable injury," the Court does not need to decide whether

1 Plaintiffs will succeed on the merits. *Id.*

2 Plaintiffs argue that they will suffer irreparable injury because (1) if they are required to
3 increase employee compensation and Measure C is ultimately invalidated, California Labor Code §
4 221 would prevent them from recouping any additional wages paid to meet the minimum
5 compensation requirements of Measure C; (2) Plaintiffs would have to alter pre-existing contracts
6 with third-parties since several of the third-party contractors indicated that they would sever the
7 contracts with Plaintiffs rather than operate under the terms imposed by Measure C; (3) Measure C
8 would disrupt operations by allowing impermissible union solicitations of employees; and (4)
9 Measure C interferes with the state and federal constitutional rights of Plaintiffs, their employees
10 and contractors.

11 Plaintiffs' first contention, as presented, is without merit. Plaintiffs have not alleged or
12 provided any evidence that they will have to increase their employee compensation. Defendant
13 asserts that Plaintiffs were already paying their employees the minimum wages required by Measure
14 C prior to Measure C's enactment, and Plaintiffs have neither rebutted nor responded to Defendant's
15 assertion. Clearly, without any assertion or evidence that they will have to raise wages, there is no
16 legitimate basis to conclude that they will need to recoup additional wages paid.

17 Plaintiffs' second argument that damage to existing business relationships and accumulated
18 goodwill constitutes a threat of irreparable harm is not persuasive. Plaintiffs' reliance on *Stuhlbarg*
19 *Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) to support this proposition
20 is misplaced, because it is a trademark case, and irreparable injury may be presumed from a showing
21 of the likelihood of success on the merits (which involves the likelihood of confusion between
22 plaintiff's and defendant's marks) in trademark cases. *See GoTo.com, Inc. v. Walt Disney Co.*, 202
23 F.3d 1199, 1205 n. 4 (9th Cir. 2000). Outside of trademark cases, "economic and reputational
24 injuries are generally not irreparable." *Bannum, Inc. v. District of Columbia*, – F.Supp.2d –, 2006
25 WL 832466, at *2 (D.D.C. March 30, 2006) (internal citation omitted); *see also Vera, Inc. v. Tug*
26 *Dakota*, 769 F.Supp. 451, 454 (E.D.N.Y. 1991) ("[I]f the wrongful activity threatens only the
27 disruption as opposed to the destruction of an ongoing business there is no irreparable injury.").
28 This is because economic and reputational injuries can be adequately compensated at a later date, in

1 the ordinary course of litigation. Here, Plaintiffs have not shown that their businesses will be
2 destroyed if, as Plaintiffs allege, several subcontractors terminate their contracts with Plaintiffs. Nor
3 have Plaintiffs shown that the economic damages they will suffer as a result of having to find new
4 subcontractors cannot be adequately compensated at a later time.

5 Plaintiffs' third contention is that they will suffer irreparable harm because Measure C would
6 disrupt operations by allowing impermissible union solicitations of employees. Plaintiffs lack
7 standing to challenge the provision, allowing any organization assisting employees in the hospitality
8 industry access to the hotels' workforce to be used for the purpose of monitoring compliance with
9 the Ordinance, because they have not provided any evidence that the provision will injure them in
10 the distinct and palpable, rather than conjectural or hypothetical way. *See supra* at 11-14. *See also*
11 *Allen*, 468 U.S. at 751 ("The injury alleged must be . . . 'distinct and palpable' . . . and not 'abstract'
12 or 'conjectural' or 'hypothetical' . . ."). The access is allowed solely for the purpose of monitoring
13 compliance with the Ordinance. Thus, Plaintiffs' allegations that unions will use such access to
14 impermissibly solicit their employees to join the unions is wholly speculative. It is well-settled that
15 a preliminary injunction will not issue to prevent a mere speculative injury. *See Regents of*
16 *University of California v. American Broadcasting Companies*, 747 F.2d 511, 523 (9th Cir. 1984).
17 Thus, this argument fails as well.

18 Finally, Plaintiffs set forth a two-prong argument that Measure C's interference with the state
19 and federal constitutional rights of Plaintiffs, their employees and contractors constitutes irreparable
20 harm. First, Plaintiffs assert that the injury to the employees will result from the disclosure of their
21 confidential information. As discussed previously, Plaintiffs lack standing to assert the rights of
22 third parties. Second, Plaintiffs rely on *Associated Gen. Contractors of Cal., Inc. v. Coalition for*
23 *Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991), for the proposition that the denial of
24 constitutional rights constitutes irreparable harm for purposes of injunctive relief. In *Associated*
25 *Gen. Contractors*, the Ninth Circuit reiterated the rule that an alleged unconstitutional infringement
26 will often be sufficient to presume irreparable harm. *Id.* However, it reserved the question whether
27 a presumption arises in cases where a plaintiff, as here, has asserted primarily economic damage. *Id.*
28 at 1412 n. 9 (citing *Northeastern Florida Chapter of Ass'n of General Contractors of America v.*

1 *City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). In *Northeastern*, the Eleventh Circuit
 2 found that the presumption did not arise in cases where the plaintiff has asserted primarily economic
 3 damage and has not alleged an invasion of privacy or a violation of the First Amendment rights. *Id.*
 4 at 1285-86. The following language in *Northeastern* is particularly instructive:

5 When a federal court before trial enjoins the enforcement of a municipal ordinance adopted
 6 by a duly elected city council, the court overrules the decision of the elected representatives
 7 of the people and, thus, in a sense interferes with the processes of democratic government.
 8 Such a step can occasionally be justified by the Constitution (itself the highest product of
 9 democratic processes). Still, preliminary injunctions of legislative enactments – because
 they interfere with the democratic process and lack the safeguards against abuse or error that
 come with a full trial on the merits – must be granted reluctantly and only upon a clear
 showing that the injunction before trial is definitely demanded by the Constitution and by the
 other strict legal and equitable principles that restrain courts.

10 *Id.* at 1285.

11 Plaintiffs have failed to make a clear showing that the preliminary injunction is necessary to
 12 prevent irreparable harm. Plaintiffs' Motion for Preliminary Injunction is DENIED on that ground.
 13 See *Oakland Tribune*, 762 F.2d at 1376 (if the court determines that plaintiffs have not made a
 14 showing of "a significant threat of irreparable injury," the court does not need to decide whether
 15 plaintiffs will succeed on the merits).

16 ***B. Likelihood of Success***

17 Even if the Court were to find that Plaintiffs have demonstrated a significant threat of
 18 irreparable injury, the Court would nevertheless deny the motion for preliminary injunction.
 19 Plaintiffs have not shown a likelihood of success on the merits.

20 i. Preemption by the National Labor Relations Act

21 (a) *Machinists Doctrine*

22 Plaintiffs argue that they are likely to succeed on the merits because Measure C is preempted
 23 by the National Labor Relations Act ("NLRA"). Although the NLRA does not contain an express
 24 preemption clause, "the Supreme Court has nevertheless articulated two NLRA preemption
 25 principles." *Associated Builders v. Nunn*, 356 F.3d 979, 987 (9th Cir. 2004). The two principles
 26 include the *Machinists* doctrine and the *Garmon* doctrine. Plaintiffs assert that Measure C is
 27 preempted by both.

28 The *Machinists* doctrine prohibits States from imposing restrictions on labor and

1 management's "'weapon[s] of self-help"' that were left unregulated in the NLRA because Congress
 2 intended for tactical bargaining decisions and conduct "'to be controlled by the free play of economic
 3 forces.'" *Associated Builders*, 356 F.3d at 987 (citing *Lodge 76, Int'l Ass'n of Machinists v. Wis.*
 4 *Empl. Relations Comm.*, 427 U.S. 132, 140 (1976)).

5 Plaintiffs argue that Measure C is preempted under the NLRA because it targets four hotels,
 6 and interferes with their use of legitimate "economic weapons" in their bargaining with employees.
 7 They rely on *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) as support for their
 8 argument that it is unlawful for "prevailing wage requirements" to target specific entities, especially
 9 when they are "so restrictive as to virtually dictate the results" of collective bargaining. *Id.* at 501.
 10 Plaintiffs' reliance on *Bragdon* is misplaced. In the cases following *Bragdon*, the Ninth Circuit has
 11 explained that:

12 *Bragdon* must be interpreted in the context of Supreme Court authority and our other, more
 13 recent, rulings on NLRA preemption. While *Bragdon* emphasized that the Contra Costa
 14 County ordinance 'targets particular workers in a particular industry,' *id.* at 504, we have
 15 since explained on several occasions that the NLRA does not authorize us to preempt
 16 minimum labor standards simply because they are applicable only to particular workers in a
 17 particular industry. [citations omitted] It is now clear in this Circuit that state substantive
 18 labor standards, including minimum wages, are not invalid simply because they apply to
 19 particular trades, professions, or job classifications rather than to the entire labor market.

20 *Associated Builders*, 356 F.3d at 990. Furthermore, Measure C imposes a minimum wage
 21 regulation, rather than a prevailing wage requirement, and the Ninth Circuit in *Bragdon* expressly
 22 distinguished minimum wage regulations as lawful. *Id.* at n. 8 (citing *Bragdon*, 64 F.3d at 502).

23 Plaintiffs next argue that Measure C infringes on the collective-bargaining process by
 24 "tilt[ing] the negotiating field in labor's favor by giving extra powers to unions" Motion at 10.
 25 Specifically, Plaintiffs claim that such infringement stems from the following provisions: (1) access
 26 to Plaintiffs' workforce by organizations assisting employees in the hospitality industry for the
 27 purpose of ensuring Plaintiffs' compliance with the Ordinance (§ IV.G); (2) disallowing non-union
 28 employees to waive any provisions of the Ordinance and allowing the unions to waive them (§
 IV.D.); and (3) the 90-day stay on layoffs provision following a sale of the hotel or a change of the
 employer within the hotel (§ I.B.) Because Plaintiffs have not demonstrated that they have standing
 to challenge any of these provisions, none of the arguments supports a finding of a likelihood of

1 success on the merits.¹¹

2 Finally, Plaintiffs argue that by virtue of Measure C, City officials are impermissibly injected
 3 into labor negotiations. Specifically, Plaintiffs argue that Measure C requires the City Manager to
 4 fix the value of any benefits package offered by Plaintiffs, thereby manipulating any negotiated
 5 apportionment of employee compensation between cash wages and health benefits. This argument
 6 is pure hyperbole. Measure C requires no such thing. Measure C leaves it to up the employer and
 7 employees to determine how much money to spend on wages versus benefits, or even whether to
 8 provide any benefits. The employer is free to provide benefits on an hourly basis or not on an hourly
 9 basis. Should the employer choose to provide benefits on an hourly basis, the City Manager has no
 10 authority to fix any benefits packages. If the employer chooses to provide benefits and to do so not
 11 on an hourly basis, the employer still does not need to provide any benefits data to the City Manager,
 12 if the employer does not want to receive a credit for such benefits. Only if the employer chooses to
 13 provide health benefits, *and* to do so not on an hourly basis, *and* to receive a credit for the benefits,
 14 must the employer present data to the City for the City Manager to estimate the value of such
 15 benefits on an hourly basis. However, Plaintiffs are incorrect in suggesting that the City Manager
 16 has any authority to force the employer to provide a certain amount of health benefits. *See*
 17 Ordinance, § I.A.3.¹²

18
 19 ¹¹ Even if the Court were to find that Plaintiffs have standing to challenge these provisions,
 20 Plaintiffs would still be unable to demonstrate likelihood of success on the merits. For example, the
 21 waiver provision expressly provides an exception to the terms of Measure C for "written valid
 22 collective bargaining agreement[s]." Ordinance, § IV.D. In *Viceroy Gold Corp.*, the Ninth Circuit
 23 addressed section 750.5 of the California Labor Code prohibiting a period of employment more than
 24 eight hours within a 24-hour period for non-union employees, and allowing a period of employment
 25 up to 12 hours when the employer and a labor organization entered into a collective-bargaining
 agreement. 75 F.3d at 489. The Ninth Circuit found that such a provision was not preempted by the
Machinists doctrine because it was a narrowly tailored opt-out provision that the Supreme Court
 found valid in *Lividas v. Bradshaw*, 512 U.S. 107 (1994). Here, the waiver provision which does
 not allow non-union employees to waive any provisions of Measure C, but allows the unions to
 negotiate around Measure C requirements is very similar to the provision in *Viceroy* and
 consequently, it is unlikely to be preempted by the NLRA.

26 ¹² Section I.A.3 provides: "'Compensation' shall be defined herein as wages (or salary) and
 27 health benefits. If employer contributions for health benefits are not paid on an hourly basis but the
 28 Hotel nonetheless wishes a credit for such payments, the Hotel shall present data to the City
 concerning hours worked and health contributions made, and the City Manager or his designee shall
 estimate the value of such benefits on an hourly basis."

Plaintiffs also argue that the City is impermissibly injected into ongoing labor negotiations by virtue of the provision that the City Council can unilaterally determine that Plaintiffs have not complied with Measure C and attach conditions respecting wages hours and working conditions to Plaintiffs' rights to continue to operate their hotels. *See* Ordinance, § IV.A.¹³ However, the cases on which Plaintiffs rely to support their argument are clearly distinguishable. *See Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986) (overturning state law that conditioned grant of state taxicab franchise on settlement of strike with drivers); *Machinists*, 427 U.S. 132 (overturning state law prohibiting employees from refusing to work overtime during collective bargaining negotiations). In *Golden State*, for example, a taxicab company applied to the City of Los Angeles for renewal of its operating franchise. While the application was pending, the company's cab drivers went on strike, halting its operations. The City Council delayed action on the renewal application, allowing it to expire. During discussion on the application, the Council reached a consensus "for rejection of an extension with a possibility for reopening the issue if the parties settled their labor dispute before the franchise expired" *Id.* at 611. The Supreme Court, applying the *Machinists* doctrine, held the City Council's action illegal. The Court reasoned that the driver's union had the right to strike and the taxicab company had the right to attempt to hold out long enough to force concessions from the union. The Court construed the Council's action as improper interference with the on-going struggle and ruled that "the city was preempted from conditioning Golden State's franchise renewal on the settlement of the labor dispute." *Id.* at 618.

Here, the situation is very different. Plaintiffs' allegations that the City will use this provision to interfere with the disputes between Plaintiffs and their labor force is pure speculation. First, Plaintiffs have not alleged that there is an ongoing labor dispute. Second, this provision is simply an enforcement tool that the City can use to ensure the hotels' compliance with Measure C's requirements short of denying the hotels the permit. The provision allows a notice and hearing, and specifies that if the City attaches the conditions to the renewal of the permit they must be sufficient

¹³ Section IV.A provides: "If after notice and hearing the City Council Finds a Large Hotel has violated its permit requirements, the Council shall revoke such permit or attach conditions to the renewal of such permit sufficient to remedy past violations and prevent future violations."

1 to remedy past violations and prevent future violations of Measure C. It does not provide that the
 2 conditions must be such as to force the hotels' dispute with their labor force, or to deny them an
 3 economic weapon such as an ability to wait out a strike. Because Plaintiffs have not shown that
 4 Measure C imposes restrictions on labor and management's "'weapons] of self-help'" that were left
 5 unregulated in the NLRA," Plaintiffs have not demonstrated that Measure C is likely to be
 6 preempted by the NLRA under the *Machinists* doctrine.

7
 8 (b) *Garmon Doctrine*

9 Plaintiffs also argue that Measure C is preempted under the *Garmon* doctrine exception,
 10 which "prohibits states from regulating fields that Congress intended to occupy fully through the
 11 creation of a continuum between conduct that is either protected or prohibited by the NLRA."
 12 *Associated Builders*, 356 F.3d at 987 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S.
 13 236, 244 (1959)). Plaintiffs argue that Section IV.G. of Measure C, which provides "reasonable
 14 access" by "any organization assisting employees in the hospitality industry" is preempted by the
 15 NLRA under the *Garmon* doctrine because the "determination of the permissible time, place, and
 16 manner for labor organizing is . . . indisputably within the NLRB's primary jurisdiction." Motion at
 17 13. Because Plaintiffs have not demonstrated that they have standing to challenge the reasonable
 18 access provision and they do not argue that any other provision is preempted by the *Garmon*
 19 doctrine, they have not demonstrated that Measure C is likely to be preempted by the NLRA under
 20 the *Garmon* doctrine.

21 ii. Preemption by the Employment Retirement Income Security Act of 1974

22 Neither party disputes that the health plans provided by Plaintiffs to their employees are
 23 covered under the Employment Retirement Income Security Act of 1974 ("ERISA"). ERISA
 24 "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee
 25 benefit plan" 29 U.S.C. § 1144(a). The phrase "relate to" has been interpreted to cover state
 26 laws that contain either a "reference to" or a "connection with" a benefit plan covered by ERISA.
 27 *Cal. Div. of Lab. Standards v. Dillingham*, 519 U.S. 316, 324 (1997). The "reference to" prong
 28 "applies where the state law in question either acts 'immediately and exclusively' upon an ERISA

1 plan or the existence of such a plan is 'essential' to the law's operation." *Associated Builders*, 356
 2 F.3d at 984 (citing *Dillingham*, 519 U.S. at 325). The "connection with" prong applies to a state law
 3 "if it falls outside the scope of state laws that Congress understood would survive ERISA or if its
 4 effect is to bind ERISA plans." *Id.* However, Measure C does not relate to any employee benefit
 5 plan because it contains neither a "reference to," nor a "connection with" a benefit plan as those
 6 terms have been defined by case law.

7 The only mention of the benefit plans in Measure C is contained in Section I.A.3 which
 8 defines "compensation" for purposes of the Ordinance to include "wages (or salary) and health
 9 benefits." Ordinance, § I.A.3. The "reference to" prong does not apply to Measure C because the
 10 Ordinance does not work "immediately and exclusively" upon Plaintiffs' ERISA plans, and the
 11 existence of such plans is not essential to Measure C's operation. For example, Plaintiffs can comply
 12 with Measure C by providing minimum compensation of at least nine dollars per hour in wages
 13 alone. *See* Ordinance, § I.A.3 ("Compensation' shall be defined herein as wages (or salary) and
 14 health benefits. If employer contributions for health benefits are not paid on an hourly basis *but the*
 15 *Hotel nonetheless wishes a credit for such payments*, the Hotel shall present data to the City
 16 concerning hours worked and health contributions made . . .") (emphasis added).

17 Plaintiffs argue that, pursuant to *Associated Builders & Contractors, Golden Gate Chapter,*
 18 *Inc. v. Baca*, 769 F. Supp. 1537, 1547 (N.D. Cal. 1991), an ordinance that requires the calculation on
 19 a regular basis of the wages and benefits paid to individual workers is preempted by ERISA.
 20 Defendant responds that *Baca* is no longer authoritative, in part due to the Ninth Circuit ruling in
 21 *WSB Elec., Inc. v. Curry*, 88 F.3d 788 (9th Cir. 1996), in which the circuit rejected an ERISA
 22 preemption challenge to a prevailing wage law. The court reasoned that "regardless of how
 23 [employers] write their ERISA plans, or even whether they have ERISA plans at all, they must pay
 24 the prevailing wage, and they may do so through some combination of cash and benefits." *Id.* at
 25 796. This proposition was reaffirmed by the Ninth Circuit in *Associated Builders*, 356 F.3d at 986.
 26 Here, regardless of whether Plaintiffs have ERISA plans, and how they write their plans, the
 27 Ordinance mandates them to pay the minimum wage of \$9 per hour and the average minimum wage
 28 of \$11 per hour. They may pay the wage through some combination of cash and benefits. Measure

C does not require Plaintiffs to modify their benefit plans. The choice of amount and type of benefits remains with Plaintiffs. Measure C does not tell Plaintiffs how to write their ERISA plans or conditions some requirement on how they write their ERISA plans. Consequently, the fact that Measure C § I.A.3 allows for the incorporation of both wages and health benefits to meet the compensation requirements does not mean that the Ordinance relates to an employee benefit plan and therefore is preempted by ERISA. *See WSB*, 88 F.3d at 796 (finding no ERISA preemption where the law mandated that employers paid prevailing wage through some combination of cash and benefits). Accordingly, Plaintiffs have not demonstrated that Measure C is likely to be preempted by ERISA.

iii. Conflict with California Wage-and-Hour Law

The California Constitution allows cities and counties to make and enforce ordinances not in conflict with general laws. Cal. Const., Art. XI § 7. State law will preempt local legislation if the local legislation duplicates, contradicts, or enters an area which is fully occupied by general law. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897-8 (1993) (internal citations omitted). "Local legislation is 'duplicative' of general law when it is coextensive therewith. [Citation omitted.] Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation omitted.] Finally, local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area. . . ." *Id.*

California Labor Code § 1205(b) provides that "[n]othing in [the chapter entitled 'Wages, Hours and Working Conditions . . .'] shall be deemed to restrict the exercise of local police powers in a more stringent manner." Thus, California state law expressly contemplates further wage regulation by individual localities, demonstrating that the Legislature has expressly manifested its intent not to "fully occupy" the area. It, therefore, follows that California law preempts Measure C only if it is "duplicative" or "contradictory" to the general law.

Plaintiffs do not argue that Measure C is duplicative of state law; rather, they argue that Measure C is contradictory to four areas of California state law: (1) the lower minimum wage for "learners"; (2) the credit for meals and lodging; (3) the impact of Measure C's minimum average

1 compensation rate on the state minimum-wage law; and (4) the concepts of quantity of work versus
2 time worked.

3 As the California Supreme Court explained in *Sherwin-Williams*, "local legislation is
4 "contradictory" to general law when it is inimical thereto," 4 Cal. 4th at 897, such as when the local
5 legislation penalizes conduct which the state law expressly authorizes, or purports to permit conduct
6 which state law forbids. *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383, 397
7 (1993). Plaintiffs first argue that state law explicitly permits a lower minimum rate for "learners,"
8 which is eliminated by Measure C's minimum compensation rate that applies equally to all
9 employees, whether or not they are "learners." Motion at 17. *See also* Cal. Code Regs. tit. 8, §
10 11050.4(A).¹⁴ Defendant, on the other hand, argues that state law does not require employers to hire
11 "learners," so any impact on their hiring because of the increased compensation rate is not a conflict
12 but rather an unfortunate side-effect of Measure C's minimum compensation requirements.
13 Opposition at 18-19. Defendant is correct. The California "learners" law allowing lower minimum
14 wage for learners does not conflict with Measure C's requirement that all employees subject to the
15 Ordinance must be paid at least \$9.00 per hour. The Ordinance neither penalizes the conduct state
16 law expressly authorizes, nor permits conduct that state law forbids. It simply sets the bar higher
17 which is allowed by California Labor Code § 1205(b). *See Gilbert v. City of San Jose* (2003) 114
18 Cal.App.4th 606, 616 (local gaming ordinance was not preempted by state Gambling Control Act
19 where legislature specifically allowed local governments to promulgate more stringent local
20 controls). This is particularly true in light of California's public policy, which favors the full
21 payment of wages for all hours worked. *See Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314,
22 324 ("California's labor statutes reflect a strong public policy in favor of full payment of wages for
23 all hours worked."). This policy is demonstrated by the fact that California law limits the
24 subminimum wage to be paid to "learners" for the first 160 hours (approximately 20 days), whereas

25
26 ¹⁴ Section 11050.4(A), which applies to all persons employed in the public housekeeping
27 industry, provides in pertinent part: "Every employer shall pay to each employee wages not less than
28 . . . six dollars and seventy-five cents (\$6.25) per hour for all hours worked effective January 1,
2002, except: LEARNERS: Employees during their 160 hours of employment in occupations in
which they have no previous similar or related experience, may be paid not less than 85 per cent of
the minimum wage rounded to the nearest nickel."

1 its federal counterpart law allows the subminimum wage to be paid for the first 90 days. Thus,
2 California "learners" law simply sets a floor for the regulation of wage requirements. Measure C
3 furthers the goal of the state law by providing additional protections to the large hotels' employees in
4 the City of Emeryville. A different result would be warranted if Measure C imposed additional
5 requirements that undermined the purpose behind the state law. Thus, Plaintiffs have not
6 demonstrated that Measure C is likely to be found contradictory to California state law with respect
7 to "learners."

8 Next, Plaintiffs claim that Measure C conflicts with the IWC Wage Orders which provide
9 that employees may agree to receive meals and lodging as a credit toward their minimum-wage
10 compensation based on specified rates and values. Plaintiffs argue that Measure C conflicts with
11 this provision because it allows the minimum wage compensation under the Ordinance to be met
12 solely through a combination of cash and health benefits. Defendant responds that the state law does
13 not apply to anything beyond the state-imposed minimum wage of \$6.75 per hour. Neither parties,
14 nor the amici provide any legal authorities with respect to this issue. It is Plaintiffs' burden to make
15 a clear showing of entitlement to injunctive relief. Because Plaintiffs have not carried their burden
16 with respect to this provision, the Court is unable to conclude on this record that the IWC Wage
17 Orders are likely to preempt Measure C.

18 Plaintiffs also argue that the minimum average compensation rate contained in Measure C is
19 contradictory to the state minimum-wage law because it "obligates employers to increase the number
20 of employees at the high end of its current compensation range while decreasing (through
21 termination or attrition) the number of lower-paid workers on its payroll." Motion at 17 (emphasis
22 omitted). Plaintiffs focus on the purpose behind the state minimum-wage law, and argue that the
23 minimum average compensation rate is "at odds with the spirit and purposes of CA's current
24 minimum-wage law." Motion at 18. While the "spirit" of the state minimum-wage law provides
25 guidance in discerning the intent of legislature, it is not what the law "expressly authorizes, or . . .
26 forbids." *Bravo Vending*, 16 Cal. App. 4th at 397. Consequently, it is not, alone, a valid basis on
27 which to find a conflict. Moreover, more stringent compensation requirements are expressly
28 permitted under California Labor Code § 1205(b).

Further, Plaintiffs argue that it is nearly impossible for them to maintain the average compensation rate when independent contractors may hire people at various rates, thereby forcing either Plaintiffs or other independent contractors to adjust their practice of hiring and firing employees to maintain the average compensation higher than the required minimum of \$11 per hour. However, Plaintiffs fail to explain how the challenge in coordinating employee pay by third-party contractors amounts to a contradiction between Measure C and California state law.

The final argument set forth by Plaintiffs is that a conflict exists between Measure C's requirement of \$16.50 per hour for any room cleaner who cleans a prorated total of more than 625 square feet per hour. Plaintiffs argue that such a premium for quantity of work is contradictory to California overtime law which places a premium solely on the number of hours worked. California Labor Code § 510 states that "[a]ny work in excess of eight hours in one workday . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." Consequently, if Plaintiffs' employees worked over eight hours, regardless of the quantity of the work, they would be afforded overtime pay under state law. Measure C, on the other hand, provides for overtime pay when employees are required to clean over 5,000 square feet even if employees work only eight hours. Measure C does not alter the overtime premium payment for the number of hours worked, it only adds to as an occasion for which overtime premium must be paid those instances in which an employee is required to clean over 5,000 square feet. Providing overtime in such a situation is not expressly forbidden or required under state law. Consequently, no contradiction is created.

iv. Conflict with California's At-Will Employment

Plaintiffs' final argument regarding preemption of Measure C is that the 90-day stay on terminations following a change in ownership of the hotel or an employer within the hotel conflicts with the at-will employment provision of California law. The Court has found that Plaintiffs do not have standing to challenge the 90-day stay provision. *See supra*. Accordingly, Plaintiffs cannot succeed on the merits with respect to this claim.

v. Conflict with Constitutional Privacy Rights

Article I, section 1 of the California Constitution explicitly protects an individual's right to

1 privacy against the disclosure of private and confidential information by both private and
 2 governmental bodies. Cal. Const. Art I, sect. 1; *see also Gilbert v. City of San Jose*, 114 Cal. App.
 3 4th 606, 613 (2003). Privacy rights are subject to a balancing test, and "may be abridged when . . .
 4 there is a 'compelling' and opposing state interest." *Bd. of Trs. v. Super. Ct.*, 119 Cal. App. 3d 516,
 5 525 (1981).

6 Plaintiffs argue that the City cannot articulate any compelling need for the private employee
 7 information, and that such information is not necessary to ensure Plaintiffs' compliance with the
 8 Ordinance. Motion at 21. The Court has found that Plaintiffs cannot assert the rights of their
 9 employees. *See* Section I, *supra*. Accordingly, Plaintiffs cannot succeed on the merits with respect
 10 to this claim.

11 vi. Unconstitutionally Vague and Violates Due Process

12 "It is a basic principle of due process that an enactment is void for vagueness if its
 13 prohibitions are not clearly defined." *Greynard v. City of Rockford*, 408 U.S. 104, 108 (1972). To
 14 survive a vagueness challenge, the statute must give the person of ordinary intelligence a reasonable
 15 opportunity to know what is prohibited, so that he may act accordingly. *Id.* The statute must also
 16 provide explicit standards for those who apply it so that arbitrary and discriminatory enforcement is
 17 prevented. *Id.* However, "a party challenging the facial validity of an ordinance on vagueness
 18 grounds outside the domain of the First Amendment must demonstrate that 'the enactment is
 19 impermissibly vague in all of its applications.'" *Hotel & Motel Ass'n of Oakland v. City of Oakland*,
 20 344 F.3d 959, 972 (9th Cir. 2003) (citing *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*,
 21 455 U.S. 489, 495 (1982)). In addition, economic regulations are "subject to a less strict vagueness
 22 test because its subject matter is often more narrow and because businesses . . . can be expected to
 23 consult relevant legislation in advance of action." *Hoffman Estates*, 455 U.S. at 489. Because of the
 24 advanced warning associated with legislative actions, "due process is [generally] satisfied when the
 25 legislative body performs its responsibilities in the normal manner prescribed by law." *Hotel &*
 26 *Motel Ass'n*, 344 F.3d at 969 (citing *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir. 1995)).

27 Plaintiffs argue that Measure C is unconstitutionally vague because the ordinance (1) uses
 28 the terms "large hotel" and "hotel" interchangeably; (2) fails to identify how Plaintiffs are supposed

1 to avoid liability for employees not under their control (*i.e.*, who work for independent contractors);
 2 (3) does not explain what constitutes "reasonable access" to Plaintiffs' workforce; (4) is unclear how
 3 to reconcile the average compensation requirements with existing state laws for calculating regular
 4 and overtime rates; and (5) neglects to provide standards for the City Council to apply in
 5 ascertaining non-compliance. Plaintiffs assert that these ambiguities, in connection with the
 6 penalties for non-compliance identified in Measure C, create an unconstitutional ambiguity and a
 7 violation of due process. Motion at 22-23.

8 Plaintiffs admit that the Ordinance applies to them because they are hotels which have over
 9 50 guest rooms. Motion at 22; Ordinance, § III.1. Thus, Plaintiffs cannot complain that the
 10 Ordinance's allegedly vague interchangeable use of the terms "hotel" or "large hotel" is causing them
 11 any harm that would be redressed by favorable decision in this litigation. *See Young v. American*
 12 *Mini Theaters, Inc.*, 427 U.S. 50, 59 (1976) (plurality opinion) (holding that where ordinance is
 13 unquestionably applicable to a litigant, any vagueness has not affected them and does not violate due
 14 process); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1210 (5th Cir. 1982) (plaintiff lacked
 15 standing to challenge the terms of the ordinance for vagueness because the terms clearly applied to
 16 him); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct the statute clearly applies
 17 may not successfully challenge it for vagueness."); *United States v. Mazurie*, 419 U.S. 544, 550
 18 (1975) ("It is well established that vagueness challenges to statutes which do not involve First
 19 Amendment freedoms must be examined in light of the facts of the case at hand."). Because the
 20 Ordinance clearly applies to them, Plaintiffs have not demonstrated that they have standing to
 21 challenge it for vagueness. In addition, Plaintiffs have not demonstrated that they have standing to
 22 assert that the Ordinance is vague as applied to others. *See Basiardanes*, 682 F.2d at 1210
 23 ("Ordinarily, a litigant to whom a statute clearly applies lacks standing to argue that the statute is
 24 vague as to others.").

25 vii. Violation of Equal Protection

26 The relevant test to determine whether Measure C violates equal protection is whether a
 27 "rational basis" exists for the classification of "Hotels" set forth under Measure C. *See Burlington*
 28 *Northern R.R. Co. v. Dept. of Pub. Serv. Regulations*, 763 F.2d 1106, 1109 (9th Cir. 1985). This test

1 is applied because the case "involves 'social and economic policy' and neither targets a suspect class
 2 nor impinges upon a fundamental right." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154
 3 (9th Cir. 2004) (citing *FCC v. Beach Commun., Inc.*, 508 U.S. 307, 313 (1993)). Furthermore, "the
 4 rational-basis inquiry is a very lenient one." *RUI One*, 371 F.3d at 1156. To determine whether this
 5 standard is met, the Court only needs to determine if there are plausible reasons for the legislative
 6 action. *Id.* at 1154 (citing *Beach Commun.*, 508 U.S. 313-4).

7 In the Findings section of Measure C, there are a number of rationales set forth in support of
 8 the Ordinance, including the fact that "large hotels are better able to afford the proposed conditions,"
 9 "many large hotels are already meeting the employment conditions required by this Ordinance," the
 10 ordinance is similar to California Labor Code sections already protecting janitors, and "large hotels
 11 are generally less likely to respond by closing or reducing employment." Ordinance, § V.

12 Plaintiffs argue that Measure C arbitrarily imposes its regulations on hotel operators with
 13 more than 50 guest rooms and their hotel restaurants, while leaving other businesses with more
 14 employees and greater revenues exempt. Motion at 23. Plaintiffs conclude that this imposition is
 15 not supported by a "legitimate public-policy rationale." Any group or individual "attacking the
 16 rationality of the legislative classification ha[s] the burden 'to negative every conceivable basis
 17 which might support it.'" *RUI One*, 371 F.3d at 1155 (citing *Beach Commun.*, 508 U.S. at 315)
 18 (brackets in original). Plaintiffs fail to carry that burden. Although all businesses are not covered
 19 under Measure C, "the legislature must be allowed leeway to approach a perceived problem
 20 incrementally...[and] select one phase of one field and apply a remedy there [while] neglecting the
 21 others." *RUI One*, 371 F.3d at 1155 (citing *Beach Commun.*, 508 U.S. at 316; *William v. Lee*
 22 *Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). This is the preferred approach because the
 23 Constitution presumes that "even improvident decisions will eventually be rectified by the
 24 democratic process and . . . judicial intervention is generally unwarranted no matter how unwisely
 25 we may think a political branch has acted." *Retail Industry*, – F.Supp. –, 2006 WL 2007654 at 15.
 26 Under similar circumstances, no violation of the Equal Protection Clause has been found, even when
 27 an ordinance specifically targeted only one company. *See id.* at 13-16. Consequently, Plaintiffs are
 28 unlikely to successfully assert that Measure C violates an Equal Protection Clause.

CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT Plaintiffs' Motion for Preliminary Injunction is DENIED.

IT IS FURTHER ORDERED THAT Defendant's request for judicial notice is GRANTED as to Exhibit A, and DENIED as to Exhibit B.

IT IS FURTHER ORDERED THAT Defendant's objections to evidence and supplemental evidence are SUSTAINED in part and OVERRULED in part.

IT IS SO ORDERED.

Dated: 8/22/06


SAUNDRA BROWN ARMSTRONG
United States District Judge